No. 22240

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY E. McDOWELL,
Plaintiff-Appellant,

v.

AMERICAN MAIL LINE, LTD.,
a corporation,
Defendant-Appellee,

FIREMAN'S FUND INSURANCE COMPANY,
Intervenor-Appellant,

BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO.

Appeal from the United States District Court
for the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

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JURISDICTIONAL STATEMENT

This is an appeal from findings of fact, conclusions of law and judgment rendered in favor of appellees Henry McDowell, American Mail Line and against appellant Fireman's Fund Insurance Company.

The action was commenced by the filing of a complaint (R. 1) in admiralty alleging that the plaintiff, a longshoreman, was injured aboard the defendant's vessel, the SS OREGON MAIL, then berthed in navigable waters of the United States. Plaintiff's injuries were allegedly caused by the unseaworthiness of the SS OREGON MAIL.

Fireman's Fund Insurance Company filed a motion to intervene (R. 8) and claim (R. 10) asserting payment of compensation and medical benefits and seeking reimbursement.

The claim of Fireman's Fund was tried as a segregated issue upon a separate Pretrial Order (R. 14).

The District Court by Order (R. 21) of April 28, 1967, and findings and conclusions (R. 29) and judgment (R. 33) dismissed the claim of American Mail Line.

Fireman's Fund filed a motion for new trial (R. 34) which was denied by Order of May 31, 1967 (R. 37).

The District Court had jurisdiction by virtue of 28 USC § 1333 (Admiralty). This Court has jurisdiction by virtue of 28 USC § 1291 (appeal from a final decision of a District Court).

STATEMENT OF THE CASE

Henry McDowell was injured aboard the SS OREGON MAIL, owned by American Mail Line. He filed

a claim in admiralty against American Mail Line alleging that his injuries were caused by the unseaworthiness of the vessel. The parties agreed that he was a longshoreman employed by American Mail Line and that he was injured aboard the vessel (R. 23, Pretrial Order, Agreed Facts). It was also agreed that Fireman's Fund paid benefits required by the Longshoremen's and Harbor Workers' Compensation Act totalling $6,693.45 (Tr. 25, Ex. 2); compensation payments were $3,531.58, medical expense payments were $3,161.87.

The defendant had other insurance which would respond to any judgment in excess of the deductible (R. 17, Pretrial Order, Agreed Fact #7).

Prior to May of 1964, Fireman's Fund wrote both P & I (liability) and compensation for American Mail Line and had done so for 15 years (Tr. 11).

Thereafter American Mail Line and Fireman's Fund agreed, as a result of the *Reed* v. *SS YAKA* decision, that direct suits against American Mail Line would be handled as ordinary third party cases (Tr. 12). The defendant objected to the introduction of evidence of such an agreement as violating the parol evidence rule and as not within the issues of the case (Tr. 12). The trial judge permitted Fireman's Fund to make an offer of proof (Tr. 12, 13).

American Mail Line wanted Fireman's Fund reimbursed in third party type cases in order to show a favorable compensation loss record to better its competitive position in stevedoring operations (Tr. 19, 20).

The agreement was carried out as the cases arose, in some, Fireman's Fund was reimbursed, while in others, reimbursement was waived in order to assist in effectuating a settlement (Tr. 14). Correspondence was offered (Tr. 17, 18; Ex. 3, 4), but not accepted, showing the way in which the agreement was handled in individual cases.

The claim of Fireman's Fund was denied in its entirety and the previous order allowing intervention was rescinded (R. 33, Judgment).

Simply stated the case involves the question of which carrier, the compensation or liability, will obtain the benefit of prior compensation and medical payments when damages are ultimately awarded to a *Reed* v. *SS YAKA* type plaintiff.

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that Fireman's Fund Insurance Company had no right to intervene.

2. The District Court erred in refusing to admit into evidence the testimony of Mr. Libby, the marine secretary of Fireman's Fund, concerning the oral agreement between American Mail Line and Fireman's Fund providing for reimbursement of Fireman's Fund (Tr. 12-25). Counsel for American Mail Line objected as follows:

> "MR. WHITE: I object to that, your Honor.
> THE COURT: I am inclined to sustain the

objection, but I am going to let you go ahead so you can make your record. You may proceed.

MR. WHITE: May I just make one objection so that it will be continuing? I object to any testimony of this witness unless it is first pointed out whether he is trying to say there is ambiguity in the policy which justifies this evidence. Also, I object to any testimony regarding any agreement or understanding on the grounds that it is not within the issues of this case and would be irrelevant in any event." (Tr. 12)

3. The District Court erred in finding that the agreement providing for reimbursement of Fireman's Fund was indefinite and uncertain, varied the terms of the written policy, and in any event not applicable to this policy.

4. The District Court erred in failing to grant reimbursement as a matter of right (law) from the plaintiff McDowell or directly from American Mail Line.

SUMMARY OF ARGUMENT

1) Where the vesselowner-employer of an injured longshoreman has two underwriters, compensation and liability, the compensation underwriter should be reimbursed out of the longshoreman's recovery as an application of the doctrine of *Reed* v. *SS YAKA* and the Longshoremen's and Harbor Workers' Compensation Act;

2) Fireman's Fund and American Mail Line formed a clear workable agreement supplementing

the written portion of the compensation insurance contract providing for reimbursement; if the agreement is not enforced, the liability carrier who has defended the case and paid off the judgment will receive an undeserved windfall.

INTERVENTION

Fireman's Fund Insurance Company paid the compensation and medical expenses due McDowell under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Traditionally the employer, or if he has compensation insurance, the carrier, has a right to intervene in the employee's damage suit to protect recoupment rights granted by 33 USC § 933 (e) and (h). See *Allen* v. *Union Barge Line*, 239 F. Supp. 1004, 1966 AMC 1525 (E.D. La., 1965) aff'd. 361 F.2d 217 (C.A. 5, 1966), cert. den. Jan. 1, 1967, 17 L. Ed. 2d 545; *Mitchell* v. *SS ETNA*, 138 F.2d 37, 1943 AMC 1126 (C.A. 3, 1943).

Intervention is governed by Rule 24 of the Federal Rules of Civil Procedure. The rule was revised in the 1966 amendments but nothing in the amendment narrowed the former rule. See *Harris* v. *General Coach Works*, 37 FRD 343 (E.D. Mich. 1964); *Johnson* v. *Standard Oil Co. of Cal.*, 30 FRD 329 (D. Alaska, 1962). In both of the cited cases, the compensation carrier under state compensation acts was permitted to intervene as a matter of right to protect its interest in recouping its compensation payments.

If the carrier, here Fireman's Fund, has a right to be reimbursed in this type of case, then it would seem clear that it has a right to intervene. The logical solution appears to be to require that the compensation carrier be deemed a necessary party. See *Poleski* v. *Moore-McCormack Lines*, 21 FRD 579, (DMD 1958). It has been held that the employer's failure to intervene is fatal to its claim for reimbursement. *U. S. Lines* v. *Jarka Corp.*, 265 F. Supp. 811 (D. Mass. 1967).

In a case where an employee sues a tort feasor who is not his employer and recovers a judgment, the cases universally hold that the agency paying Longshoremen's and Harbor Workers' Compensation Act benefits is entitled to recoup its payments. *Mitchell* v. *The ETNA*, *supra*, appears to be the lead case.

The present case arises as a result of Supreme Court decisions holding that an employee injured aboard a vessel is entitled to sue the vesselowner even if the owner is also his employer. *Jackson* v. *Lykes S. S. Co.*, 386 U.S. 731, 18 L. Ed. 2d 488 (1967); *Reed* v. *SS YAKA*, 373 U.S. 410, 10 L. Ed. 2d 448, 83 S. Ct. 1349, 1963 AMC 672 (1963).

In *Jackson* the Court stated: "* * *, the fact that the longshoreman was hired directly by the owner instead of by the independent stevedore company makes no difference as to the liability of the ship or its owner." 18 L. Ed. 2d 488 at 491. Should the compensation carrier's position be any different?

American Mail Line not only stevedores its own

vessels but also does contract stevedoring for other shipowners (Tr. 19, 20). If one of the American Mail Line longshoremen sued another shipowner for injuries, Fireman's Fund would be entitled to recoup its compensation out of the recovery even though American Mail Line might be obligated to indemnify the other shipowner. See *Allen* v. *Union Barge Line, supra; Hugev* v. *Dampsk. Int.*, 170 F. Supp. 601 (S.D. Cal. 1959) aff'd per curiam 274 F.2d 875 (C.A. 9, 1960).

This Court has been concerned with *Reed* v. *SS YAKA* type cases but has never really considered the rights of the compensation carrier.

In *Grace Line* v. *Kanton*, 366 F.2d 510, 1967 AMC 514 (C.A. 9, 1966) this Court in a per curiam decision affirmed a judgment giving the defendant credit for compensation benefits paid for wage loss but refused to give credit for payment of medical benefits. In its endeavor to follow the decision in *Reed* v. *SS YAKA*, and extend Kanton the benefits guaranteed a longshoreman employed by a third party shipowner, this Court went too far. If Kanton had recovered from a third party, he would have been obliged to repay the medical expenses as well as the compensation benefits. *Mitchell* v. *The ETNA*, *supra.* This Court in effect held that Kanton was entitled to double recovery, a windfall never envisaged, it is submitted, by the *Reed* and *Jackson* cases.

At the time this brief is written, this Court has before it the case of *Shaver Transportation Company*

v. *Chamberlain,* #21871, an appeal from the District Court of Oregon. The District Judge gave credit for both compensation and medical expenses thus giving the employer's liability carrier a substantial windfall totalling $35,915.47 comprised of $28,967.47 medical expenses and $6,948 compensation for wage loss to the time of trial. The compensation carrier was not a party and surely cannot be bound by a holding adverse to its interest.

Although each case should be decided on its own merits, nevertheless as this case is involved in a new area of litigation it seems relevant to point out for consideration a few instances where problems are bound to arise. Various combinations of insurance and self insurance are possible.

The shipowner-employer can be fully insured both for compensation and liability with the same insurance company in which event no real problem exists as the payments and credits could be handled as a bookkeeping matter. At the other extreme the shipowner-employer could be completely self insured, and although such a possibility seems remote, if such were the case, no problem exists as once again payments and credits could be handled as a bookkeeping matter.

The shipowner-employer could be self insured as to compensation and fully insured as to liability. If such were the case, then if the judgment were reduced by the amount of compensation payments the carrier would, in effect, be getting the benefits of a deductible policy without the reduction in premium.

If the shipowner-employer is fully insured for compensation but has a deductible provision on its liability policy, the question of who gets credit for compensation payments, if there is to be no repayment to the compensation carrier, depends first of all whether the judgment exceeds the deductible portion. Secondly, if the credit is against the deductible portion, the insured would be getting the benefit but if it is "off the top," so to speak, the liability carrier would be getting the benefit. Here Fireman's Fund fully insures American Mail Line's compensation liability while American Mail Line had a deductible on its liability coverage.[1]

A further extension of the holding in *Kanton* is that the defendant should get credit not only for past compensation but for future compensation payments, there being no reason to distinguish between credit for past and future wage loss reduced by compensation. Pertinent portions of a pretrial order in which the liability carrier handling the defense claimed a credit for future wage loss and medical benefits is set forth in the appendix. The compensation carrier had no voice in the formation of the issues. The case was ultimately settled prior to trial thus disposing of a knotty problem.

Over the years the courts have built up workable rules for handling reimbursement in the ordinary

[1] American Mail Line's deductible was $10,000. American Mail Line's pretrial contention 8 (R. 19) asserted that repayment would be charged against American Mail Line but no evidence to support this contention was offered.

third party case i.e. repay the compensation carrier.[2]

The simple, workable and sound policy is to apply the same rule in *Reed* v. *SS YAKA* type cases thus facilitating administration of the Longshoremen's and Harbor Workers' Compensation Act and rounding out the Supreme Court's plan of eliminating arbitrary distinctions. The Court of Appeals for the Fourth Circuit apparently had these considerations in mind when it stated that:

> "If the plaintiff succeeds in this effort and ultimately in his suit, the employer may recoup the amounts already paid by deducting them when satisfying the judgment. In the event the compensation was paid by one insurer and the judgment becomes payable by another, the employer as the legal debtor in both instances may retain from the settlement of the judgment the sums necessary to reimburse the compensation carrier. The two remedies — compensation and suit—are thus made complementary. An impor-

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[2] Two problem areas are left open by *Reed, Jackson, Kanton* and *Biggs*. The first involves disposition, after deductions, of the judgment where it is less than the compensation benefits. See *Fontana* v. *Penn. Ry.*, 106 F. Supp. 461 (S.D. N.Y. 1952) aff'd 205 F.2d 151 (C.A. 2, 1953) cert. den. *Fontana* v. *Huron Steve. Co.*, 346 U.S. 886; *Davis* v *U. S. Lines*, 253 F.2d 262 (C.A. 3, 1958); *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345 (C.A. 5, 1966). The second involves the dilemma of the employer who wants to settle but who suspects that the longshoreman will recant and allege that the settlement is less than the value of his entitlements under the Act and claim the additional compensation benefits promised by the Act [33 U.S.C. § 933 (g)]. It has been held that where the employer was a party to the employee's action and signed the satisfaction of judgment, but was not a party to the release the employer had consented to the compromise and a deficiency claim was authorized. *Dudley* v. *O'Hearne*, 212 F. Supp. 763, 1963 AMC 1573 (D. Md. 1963).

tant purpose of the compensation statutes, to provide immediate relief to an injured employee, is achieved, and the injured party's opportunity to press further remedies remains unabridged." *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360, 364, 1966 AMC 578 (C.A. 4, 1966).

THE AGREEMENT

Fireman's Fund offered evidence of an oral agreement with American Mail Line which provided that *Reed* v. *SS YAKA* type cases were to be handled as the usual third party case in the sense that Fireman's Fund would be reimbursed out of the longshoreman's judgment or settlement. The evidence was ultimately disregarded on three grounds:

1) It was an oral variation from the terms of the written contract;

2) It was too indefinite to be enforceable;

3) It was not applicable to this policy (R. 21, Order April 28, 1967; R. 29, Findings of Fact). The Court had initially indicated that the proferred testimony of Mr. Libby was not within the issues (Tr. 12) but after hearing the testimony the Court indicated the question was whether the agreement violated the parol evidence rule and whether intervention proceedings were the proper forum to decide the issues.

There is nothing in the written portion of the insurance contract which would answer the question of

reimbursement. The question can only be answered by going outside the written agreement. This necessity was recognized by counsel for American Mail Line when he inserted as a part of defendant American Mail Line's pretrial Order, contentions 4 and 7. In 4, it was contended that the Fireman's Fund made the payments with no "expectation or agreement to have it repaid" and in 7 it was contended that when Fireman's Fund made the payments to McDowell "it did not contemplate securing reimbursement" (R. 19).

The written policy certainly cannot be varied or modified by parol evidence to suit the desires of the parties after a problem arises, but the courts have long held that parol evidence is admissible to show:

1) A collateral agreement;

2) A modification;

3) The intention of the parties.

The testimony of Mr. Libby was admissible on any and all of the above grounds. The testimony did not vary or contradict any provision of the policy and as a matter of fact was consistent with the policy. Endorsement Number Fourteen reads as follows:

> "It is understood and agreed that this policy excludes any and all liability of the Insured covered by or under the Insured's policies of protection and indemnity insurance, or for any loss, damage or expense which would have been payable under the terms of a protection and indemnity policy." (Tr. 25, Ex. 1)

The parol evidence rule bars evidence of those aspects of the contract which the parties intended to include in the writing. *Caldwell* v. *Wells*, 228 Or. 389, 395, 365 P2d 505 (1961). "Whether the parties intended to integrate their agreement in the writing is a question of fact in each case." *Caldwell* v. *Wells*, *supra*, 228 Or at 395.

Are oral insurance policy terms enforceable? The answer is yes. *Bird* v. *Central Mfgrs. Ins. Co.*, 168 Or. 1, 120 P.2d 753 (1942). The insurance contract is enforceable as a whole even though it is partly oral and partly written. *Cerino* v. *O.P.S.*, 202 Or. 474, 276 P.2d 397 (1954). See also *Mock* v. *Glens Falls Indemnity Co.*, 210 Or. 71, 309 P.2d 180 (1957).

While this proceeding was not a suit to reform a policy, the rules applicable to such cases are helpful to show that oral terms are enforceable. In deleting an exclusion relating to demolition work, the Wisconsin Supreme Court held that:

> "A policy of insurance may be changed or modified by a new or distinct [oral] agreement subsequently entered into between the parties." *Jeske* v. *General Acc. F. & L. Ass. Corp.*, 83 N.W.2d 167, 177 (Wisc., 1957).

See also *Knickerbocker L. Ins. Co.* v. *Norton*, 96 U.S. 234, 24 L. Ed. 689 (1877) where agreements changing the premium payment terms were upheld.

The defendant objected to Mr. Libby's testimony as a violation of the parol evidence rule. However, it

must be noted that as Mr. Libby's testimony tended to explain and tell the court what the parties had intended, his testimony was directly related to the defendant American Mail Line's pretrial contentions 4 and 7 above noted.

American Mail Line offered no evidence of the intention of the parties in support of the quoted contentions it had made. Fireman's Fund offered evidence on the issue. The District Court should have given full credence and effect to the testimony of Mr. Libby which was not only uncontradicted but corroborated by a letter from American Mail Line (Tr. 17, Ex. 4) dated February 3, 1966, just a month before Mr. McDowell's accident, and a letter from counsel (Tr. 17, Ex. 3) dated October 14, 1965.

The rule to be applied in considering the dealings of the parties is:

> " 'Previous dealings between the parties are the strongest and in most instances, the most definite basis for implying terms of a contract.' " *Hamacher* v. *Tumy*, 222 Or. 341, 350, 352 P.2d 493 (1960) quoting Patterson, Essentials of Insurance Law (2d Ed.) p. 88.

The District Court as noted by counsel (Tr. 27) has applied the same principle. See *Close-Smith* v. *Conley*, 230 F. Supp. 411 (D. Or. 1964).

The California Supreme Court has explained the rule as follows:

> " 'This was a practical construction placed upon this contract by the parties themselves,

which renders it immaterial to consider what might be the literal construction of its terms. Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions.' [Quoting *Mitau* v. *Roddan*, 149 Cal. 1, 84 P. 145, 150]

"This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words'. Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.

"Appellants correctly claim that this doctrine of practical construction can only be applied when the contract is ambiguous, and cannot be used when the contract is unambiguous. That is undoubtedly a correct general statement of the law. (citing cases). But the question involved in such cases is ambiguous to whom? Words frequently mean different things to different people. Here the contracting parties demonstrated by their actions that they knew what the words meant and were intended to mean. Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties by their actions have created the 'ambiguity' required to

bring the rule into operation. If this were not the rule, the courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different." *Crestview Cemetery Association* v. *Dieden*, 8 Cal Rptr 427, 433, 434 (1960).

The Supreme Court of the United States in *Reed* v. *SS YAKA*, *supra*, separated ownership liability from employer's liability (or at least the rationale of separation is a reasonable analysis of the decision.) The defendant American Mail Line when sued by McDowell was liable as owner of the SS OREGON MAIL on which McDowell was employed when he was injured. A logical extension of the decision in *Reed* v. *S.S. YAKA* is that the compensation carrier is to be allowed recoupment of its compensation and medical payments out of the plaintiff's judgment as in the ordinary third party case where its lien is enforced. See *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345 (C.A. 5, 1966). The defendant owner, when he is also the employer is only exchanging liability dollars and if he has liability coverage his liability carrier is only paying what it contracted to pay. It has been held that as between competing carriers the workmen's compensation carrier is to be favored. *Horne* v. *Sup. L. Ins. Co.*, 203 Va. 282, 123 S.E.2d 401 (1962).

If the shipowner has a high deductible and the longshoreman's recovery is within the deductible as is the compensation payments, the shipowner, in making the payment to the longshoreman who in

turn repays the compensation carrier, is only carrying out a business decision made for his own economic reasons. The exchange of dollars was the plan adopted by the court in *Biggs* v. *Norfolk Dredging Co., supra.*

Even if this Court would otherwise feel constrained to apply the rule of *Grace Line* v. *Kanton, supra*, and allow defendant American Mail Line an offset for compensation payments but not for medical payments, nevertheless, the *Kanton* rule is not applicable to this case where the defendant and its insurance carrier have specifically contracted for the handling of such cases.

The contract between American Mail Line and Fireman's Fund provides that American Mail Line will pay the plaintiff his full damage adjudged and that Fireman's Fund will recoup its payments from the plaintiff. The plaintiff will not receive a double recovery or windfall.

The proof submitted establishes the contract and is admissible for this purpose without violating the parol evidence rule.

Having established the right of Fireman's Fund to recoupment the question is whether this court will, by not granting an offset, enforce the terms of the insurance contract. The question can also be asked in this form: why require two lawsuits with possible attendant disparity of result and duplication of effort when by the simple expedient of allowing Fireman's Fund to recoup its payments out of the plain-

tiff's judgment the whole case is disposed of in one proceeding.

It is appropriate to quote Judge John R. Brown when the court is called upon to fashion a suitable decree:

> "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels." *Compania Anonima Venezolana de Nav. v. A. J. Perez Exporting Co.*, 303 F.2d 692 (C.A. 5, 1962) at page 699.

CONCLUSION

1. Fireman's Fund believes that the decision in *Reed* v. *SS YAKA* establishes that the shipowner (or vessel as the case may be) is a third party within the meaning of the Longshoremen's and Harbor Workers' Compensation Act and accordingly Fireman's Fund as compensation carrier is entitled to recoup its payments out of the plaintiff's recovery from the shipowner.

2. American Mail Line and Fireman's Fund contracted to handle suits against American Mail Line by longshoremen the same as suits against a third person. The terms of such contract was proven by oral evidence and formed a binding contract which should be enforced according to the terms proven. Therefore, even if *Kanton* would preclude the adop-

tion of Fireman's Fund's analysis of *Reed* v. *SS YAKA*, the court should follow the contract made by the parties and permit Fireman's Fund to recoup its payments out of McDowell's recovery.

Respectfully submitted,

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Attorneys for Fireman's Fund Insurance Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LLOYD W. WEISENSEE,
Attorney

APPENDIX

"UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GLEN R. SMITH, Plaintiff, v. STATES STEAMSHIP COMPANY, a corporation, Defendant.	Civil No. 66-389 AMENDED PRETRIAL ORDER

* * *

AGREED FACTS

* * *

"7. Plaintiff was hired by defendant through the supercargos' and Checkers' Union hiring hall to work as a checker during the discharge of cargo from the ship on July 28, 1964. Plaintiff's duties were to observe, count and mark the cargo being discharged from the No. 2 hatch on the night shift July 28, 1964. His duties required him to work on both the dock and the vessel and to enter the hold of the vessel as occasion required.

"8. While plaintiff was working in the No. 2 hatch other men who were longshoreman employees of an independent contracting stevedore company and not employees of defendant were working in the hatch discharging the cargo."

* * *

DEFENDANT'S CONTENTIONS

* * *

"5. In accordance with the Longshore (sic) and

Harborworkers' Compensation Act defendant secured to plaintiff the payment of all of his medical expenses incurred as a result of the injury alleged herein, in the amount of $193.00. Plaintiff is not entitled to recover for such expenses herein.

"6. In accordance with the Longshore (sic) and Harborworkers' Compensation Act defendant secured to plaintiff the payment of compensation in the amount of $320. Plaintiff is not entitled to recover this amount by way of past wage loss herein.

"7. Plaintiff is not entitled to recover herein for any future medical expense because under the Compensation Act his rights to full medical benefits are not terminated by judgment herein.

"8. Plaintiff is not entitled to recover herein for loss of future wages except insofar as it is proved that such future wage loss exceeds the compensation for disability secured to plaintiff by defendant in accordance with the Compensation Act."

* * *

ISSUES OF LAW

* * *

"2. Is plaintiff precluded from recovering past and future medical expense because defendant has provided him with insurance which pays such expenses?

"3. Is Plaintiff precluded from recovering past and future wage loss to the extent that defendant has provided him with insurance which pays such loss?

* * *"